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# Rehabilitating the Impeached Witness with Consistent Statements

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# REHABILITATING THE IMPEACHED WITNESS WITH CONSISTENT STATEMENTS

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In the recent case of *Stafford v. Lyon*[1] a witness testified on direct examination that the cause of a four-car chain type collision was the third car hitting the second car and forcing it forward into the first car. On cross-examination the witness was impeached with his written statement that he was not certain of the sequence of the collisions. He admitted making this statement. On re-direct examination an earlier written statement was admitted wherein he described the sequence of collisions as he had on direct examination. On appeal the Missouri court was confronted with the problem that is the subject of this article: under what circumstances may the witness' out-of-court statements which are consistent with his in-court testimony be used for rehabilitation? In a majority of jurisdictions the consistent statement in *Stafford* would be excluded;[2] the Missouri court followed its prior decisions and approved the admission of the statement.[3]

## I. THE ADMISSIBILITY OF CONSISTENT STATEMENTS

### A. *For Purposes Other Than Rehabilitation*

Consideration of the use of consistent statements to rehabilitate must begin with an examination of the admissibility of consistent statements in general. The widely accepted rule is that, apart from rehabilitation, out-of-court statements consistent with the witness' in-court testimony are not admissible.[4] In the very early case of *Riney v. Vanlandingham,*[5] the defendant called witnesses to relate occasions on which they had heard the defendant tell the same story as he told on the witness stand. The Missouri Supreme Court adopted the general rule rejecting the evidence.

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1. 413 S.W.2d 495 (Mo. 1967).
2. Annot., 140 A.L.R. 21, 49 (1942); 75 A.L.R.2d 909, 930 (1961); MCCORMICK, EVIDENCE § 49 (1954).
3. Stafford v. Lyon, 413 S.W.2d 495, 498 (Mo. 1967).
4. 4 WIGMORE, EVIDENCE § 1124 (3rd ed. 1940).
5. 9 Mo. 816 (1846).

On several occasions, the court has reaffirmed the rule.[6] They have rejected testimony of the particular facts of a rape as related by the victim after the crime occurred[7] even when the prosecutrix was a child of weak mind whose testimony on direct was poor.[8] They have refused to allow the testimony of a railroad employee to be corroborated by his oral or written report to his employer containing the same facts as his testimony.[9] They have reversed the trial court where a witness was allowed to state on re-direct examination that before trial he told his attorney the same facts as he testified to on direct examination.[10] In these cases the court has reasoned:

> To permit a party to corroborate a witness by proof that on some other occasion the witness made the same statements to another party which he or she has testified to upon the trial would set up a new and dangerous method of corroboration. . . . If such a practice . . . were permitted, an untruthful witness could then corroborate himself as to a falsehood by first relating the falsehood to other parties, and then, after he has sworn to the falsehood, introduce such other parties to show that he has theretofore made the same statements to them.[11]

These cases exemplify the well accepted general rule: in the absence of some special function, the out-of-court consistent statement of the witnss will not be admitted in evidence.

### B. *For Rehabilitation*

#### 1. In General

When consistent statements are admitted, it is generally for the purpose of rehabilitating an impeached witness. They can not be used to rehabilitate all impeached witnesses, however, but are admitted only in certain situations. In analyzing and classifying these situations, some courts have failed to recognize that they are essentially dealing with a question of relevancy.

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6. State v. Johnson, 334 Mo. 10, 64 S.W.2d 655 (1933); Quinn v. Berberich, 68 S.W.2d 925 (St. L. Mo. App. 1934); State v. Emma, 324 Mo. 1216, 26 S.W.2d 781 (1930) (dictum); see Ayres v. Keith, 355 S.W.2d 914, 921 (Mo. 1962).
7. State v. Newcomb, 220 Mo. 54, 119 S.W. 405 (1909); State v. Bateman, 198 Mo. 212, 94 S.W. 843 (1906); State v. Jones, 61 Mo. 232 (1875). *Contra,* State v. Richardson, 349 Mo. 1103, 163 S.W.2d 956 (1942).
8. State v. Burgess, 259 Mo. 383, 394-96, 168 S.W. 740, 742-43 (1914).
9. Aly v. Terminal R.R. Ass'n of St. L., 336 Mo. 340, 78 S.W.2d 851 (1934); Radler v. St. Louis-S.F. Ry., 330 Mo. 968, 51 S.W.2d 1011 (1932).
10. State v. Brown, 247 Mo. 715, 153 S.W. 1027 (1913).
11. State v. Burgess, 259 Mo. 383, 395, 168 S.W. 740, 742 (1914).

To frame correctly the relevancy issue, there are two important considerations. The first is a recognition of the scope of the rehabilitating evidence. Consistent statements are not admitted as substantive proof of the facts stated since to do so would violate the hearsay rule.[12] They are admitted only for the purpose of showing the *act of making* the consistent statement. The scope of the rehabilitating evidence is the fact of assertion, not the facts asserted.[13] The second consideration is to determine correctly the issue which the evidence is offered to prove. In the rehabilitation situation, that issue is determined by the nature of the impeaching evidence. It is essential to consider carefully the type of impeachment and to determine how that particular evidence serves to discredit the witness. The admission or exclusion of the consistent statement should depend on whether it effectively meets the impeaching fact.

In general, the question is one of relevancy: in particular, it is whether the act of making a consistent statement is relevant to refute the impeaching fact. Because of the importance of carefully applying this reasoning to the problem, it is misleading merely to classify the cases as generally involving rehabilitation. They are better categorized and considered according to the nature of the impeachment. The discussion which follows is organized on that basis.

### 2. Rehabilitation After Impeachment Charging Bias

The courts in most states admit certain consistent statements for the rehabilitation of a witness impeached by a showing of bias, interest, or corruption.[14] Bias can be based either on the claim that the witness is particularly friendly to one party or that he is hostile to the other. For example the former might be shown by evidence of a family or business relationship between the witness and the party calling him, the latter by showing that the witness and the opposing party had a fight or that a law suit is pending between them. Impeachment by showing interest involves evidence that the witness is financially interested in the outcome of the litigation such as where he will share in the proceeds. The classic

12. Stratton v. City of Kansas City, Mo., 337 S.W.2d 927, 930-32 (Mo. 1960); State v. Emma, 324 Mo. 1216, 1224-25, 26 S.W.2d 781, 785 (1930); Gough v. General Box Co., 302 S.W.2d 884, 888 (Mo. 1957) (dictum); Hammond v. Schuermann Bldg. & Realty Co., 352 Mo. 418, 177 S.W.2d 618 (1944) (dictum); State v. Creed, 299 Mo. 307, 314-17, 252 S.W. 678, 680 (1923) (dictum).

13. Hammond v. Schuermann Bldg. & Realty Co., *supra* note 12, at 423, 177 S.W.2d at 622.

14. Annot., 140 A.L.R. 21, 80 (1942); 75 A.L.R.2d 909, 937 (1961); WIGMORE, *op. cit. supra* note 4, § 1128.

example of impeachment by showing corruption is where the witness is bribed. These are only a few examples of the infinitely varied circumstances giving rise to this method of impeachment. For brevity, all these will be referred to as bias cases.

The impeaching evidence in these cases tends to show the existence of facts or circumstances which are claimed to have improperly influenced the testimony of the witness. How is evidence of a consistent statement by the witness relevant to refute this impreachment? If the witness made the consistent statement at a time before the discrediting influence existed this indicates that the impeaching circumstance actually had no effect on the testimony. The evidence is focused on cause—it suggests that the bias did not cause false testimony since the testimony has not changed. The statement is usually not offered to refute the existence of the impeaching facts: it is offered to refute the claim that those facts had any effect on the testimony. It is the timing of the statement which makes it relevant, and only those statements made prior to the time of the claimed bias are admissible. This is the rationale for the use of consistent statements in these cases.

Two Missouri cases clearly demonstrate this theory. In *Kelly v. American Cent. Ins. Co.*,[15] an action on a fire insurance policy, the company's witness testified that he was hired by the plaintiff to set the fire. On cross-examination the plaintiff impeached with evidence suggesting that the witness was being paid by the insurance company to testify falsely. To rehabilitate, evidence was admitted showing that the witness made statements confirming the truth of the arson charge three days prior to the fire. Since at that time the insurance company had no interest in either the witness or the fire, the consistent statements were effective to refute the bribery charge. The court stated:

> The exception [admitting the consistent statement] . . . proceeds of sound reason and in accord with the principles of natural justice, for, on the suggestion of a corrupt motive for such testimony coming in, it enables the party to rehabilitate the witness by showing that he had made the same statement at a time prior to any occasion for the corruption of the witness, and thus tends to remove the shadow so cast.[16]

In *State v. Stogsdill*[17] the prosecution claimed that the defendant and three

15. 192 Mo. App. 20, 23-26, 178 S.W. 282, 283 (St. L. Ct. App. 1915).
16. *Id.* at 25, 178 S.W. at 283.
17. 324 Mo. 105, 126, 23 S.W.2d 22, 29-30 (1929). The witness was also impeached by showing his prior inconsistent testimony at an inquest where he testified he knew nothing about the killing, but the admission of the consistent statement is clearly under the bias rule.

fellow railroad employees killed another employee who had seniority rights over them. The witness, one of the wrongdoers, testified that the defendant had committed the killing. On cross-examination there was evidence that the witness had been promised leniency in his own case as a reward for his testimony against the defendant. The state was then allowed to show that before the offers of leniency were made, and therefore at a time before these improper influences could have operated upon the witness, he made statements that the defendant committed the killing. Again the Missouri court approved rehabilitation with consistent statements in bias cases, and they have recognized this rule on several other occasions.[18]

Since the whole theory of admission is based on the premise that the statement predates the existence of the discrediting influence, proof of the time when the statement was made is crucial. In a hit and run case,[19] where the impeachment was again based on offers of leniency by the prosecuting attorney, the court held that the party who offers the consistent statement has the burden of proving the requisite time relationship between the improper influence and the making of the statement. The court approved exclusion of the rehabilitating statement because the state failed to develop facts as to the time sequence.

The rationale is sound, the rule is clear, and most courts including Missouri have had little difficulty in using prior consistent statements to refute impeachment based on bias.

3. Rehabilitation After Impeachment Charging "Recent Fabrication"

Another type of impeachment where consistent statements are relevant for rehabilitation is called "recent fabrication"[20] or "recent contrivance."[21] In general, these cases involve impeachment by a charge that the testimony of the witness is a fabrication of recent date, or complaint only recently made. The common characteristic in these cases is the implication that the testimony of the witness is not the story told by him from the beginning, but is one concocted for the purpose of the trial.

18. State v. Brown, 247 Mo. 715, 725-27, 153 S.W. 1027, 1030 (1913) (dictum); State v. Taylor, 134 Mo. 109, 154-56, 35 S.W. 92, 103 (1896) (dictum); Riney v. Vanlandingham, 9 Mo. 816, 821-22 (1846) (dictum); Williams v. St. Louis Pub. Serv. Co., 245 S.W.2d 659, 665 (St. L. Mo. App. 1952) (dictum) *rev'd on other grounds* 363 Mo. 625, 636, 253 S.W.2d 97, 103-04 (En Banc 1952). See State v. Creed, 299 Mo. 307, 252 S.W. 678 (1923).

19. State v. Tippett, 317 Mo. 319, 324-25, 296 S.W. 132, 134 (1927).

20. Annot., 140 A.L.R. 21, 93 (1942); 75 A.L.R.2d 909, 939 (1961); 58 AM. JUR. *Witnesses* § 828 (1948).

21. 4 WIGMORE, EVIDENCE § 1129 (3rd ed. 1940).

The courts have used this "recent fabrication" label in cases involving two distinctly different theories of impeachment: those where the fact of false testimony must be inferred from evidence of motive for fabrication, and those where there is evidence indicating the testimony is false but no showing of motive. The latter type of cases are often called the silence cases because impeachment is based on evidence that the witness did not speak of a fact at a time when it would have been natural to speak of it. The inference that the testimony is a recent fabrication is drawn from the fact that on a prior occasion when the witness told his story, he did not include some fact which he now includes. The addition of this fact is claimed to be the recent fabrication. The distinguishing feature of this impeachment is that it is not based on a showing of motive for fabrication; the false nature of the testimony is to be inferred solely from a comparison of the present testimony with the prior story.

This impeachment can be refuted in two ways with consistent statements. First, it may be shown that the witness was not silent as alleged but in fact made the statements claimed to have been omitted. Because of the nature of the impeachment these statements will be consistent with the testimony of the witness. The relevance of the statements in this situation is obvious: they directly contradict the charge of silence. Second, the impeachment may be refuted by showing consistent statements made at a time near the alleged silence although not on that particular occasion. Here, the evidence does not directly contradict the charge of silence. It is relevant, however, because it tends to explain the ambiguous nature of the silence. The rationale of the impeachment is to infer from the silence that the testimony was recently fabricated for purposes of this litigation. But other inferences could just as easily be drawn; the silence may indicate mere forgetfulness or oversight. Evidence that the witness included the missing fact when he told the story on another occasion at or near the time of the silence is relevant because it suggests forgetfulness or oversight instead of subsequent fabrication. This tends to remove the discrediting inference created by the silence.

In either situation, the relevance of the consistent statement is clear, and courts have generally admitted the statements in the silence cases.[22] In one Missouri case[23] that involved this type of impeachment the court held that the consistent statement was not admissible because it was not prior in time to the alleged silence. Furthermore the court stated that this

22. *Ibid.*
23. State v. Ashbrook, 11 S.W.2d 1037, 1040 (Mo. 1928).

type of impeachment will not authorize rehabilitation under the rules applied when the witness is impeached with inconsistent statements.[24] This, of course, is true, but the court stopped far short of the correct consideration of the problem since they failed to recognize or discuss the completely different rationale for admitting consistent statements in the silence cases.

Despite this failure to apply the appropriate theory, the silence rule was clearly approved by the St. Louis Court of Appeals by the following language in *Williams v. St. Louis Pub. Serv. Co.*:[25]

> Another instance where such evidence [a consistent statement] is admitted is where the witness is discredited by showing that the facts testified to have been concealed under conditions which warrant the belief that, if true, the witness would have stated them.[26]

Another Missouri case[27] involving impeaching evidence of the silence type, combines the rationale of both the silence cases and the bias cases in a unique and well-reasoned decision. The plaintiff, an orphan boy, claimed that the defendant, with whom he lived for four years, severely beat him on four occasions. The boy was impeached by witnesses who testified that during several conversations with him while he was living with the defendant, he made no complaints of his treatment. This would be a typical silence case if the plaintiff could have then offered evidence showing complaints made while he lived with the defendant, but this could not be shown. However, plaintiff did offer evidence that he made complaints after he left the home of the defendant but before trial. The court reasoned that in the bias cases consistent statements are admitted if made at a time when motive for false testimony is not present. Although this is normally before the existence of the discrediting influence, the significant factor is the absence of the motive at the time of the statement. Here the boy did not speak while in the home of the defendant because of duress and fear. When these influences were removed by his moving from the home, his complaints were immediately voiced. By combining the reasoning of the bias cases (a consistent statement made in the absence of motive to falsify) with that of the silence cases (refuting the discrediting inference to be

24. State v. Ashbrook, *supra* note 23. *But see* State v. Sharp, 183 Mo. 715, 735, 82 S.W. 134, 141 (1904) where the facts fit the silence-recent fabrication rule, but the court applies the inconsistent statement rule.

25. 245 S.W.2d 659, 663-66 (St. L. Mo. App. 1952) (dictum) *rev'd on other grounds* 363 Mo. 625, 253 S.W.2d 97 (En Banc 1952).

26. *Id.* at 665.

27. Wills v. Sullivan, 211 Mo. App. 318, 329-31, 242 S.W. 180, 183-84 (K.C. Ct. App. 1922).

drawn from the failure to speak) the court approved the admission of this evidence. The case is unique, not only because it combines the two theories, but also because it applies the bias reasoning to admit a consistent statement made after the termination of the motive to falsify rather than before that motive existed.

Wigmore would limit "recent fabrication" to the silence cases.[28] However, many courts and writers recognize a second category.[29] These are as noted, cases where the fact of false testimony is inferred from evidence showing a motive for fabrication. A Missouri decision demonstrates the applicable situation. In *State v. Richardson*[30] the defendant was charged with the statutory rape of his fourteen year old daughter. After the girl first accused her father, she retracted her story saying it was made up to get even with him for whipping her. However, under the alleged influence of her mother and a friend, she later disavowed the retraction and accused her father in testimony for the prosecution. On cross-examination the retraction and the influence of the mother and the friend were shown. The mother was then allowed to testify that her daughter told her of the father's attack shortly after the incident. In admitting this evidence of the daughter's consistent statements the court stated:

> . . . the mother's testimony concerning the prosecutrix' original complaint—consistent with her testimony at the trial—was admissible (even in detail) to rehabilitate the prosecutrix . . . and to sustain her against the charge of "recent contrivance"—that is, of fabricating the trial charge against her father, with the aid of her mother and Mrs. Black [the friend].[31]

These cases classified under "recent fabrication" but based on a showing of motive are actually bias cases. The motive shown invariably consists of some type of bias, interest, or corruption. The consistent statements made before the existence of the motive are relevant for the same reasons as in the bias cases; they refute the inference that the motive had any effect on the testimony. Much unnecessary confusion in the cases is caused by the court's insistence on two categories for these cases without any meaningful basis upon which to distinguish one from the other. Thus on one occasion a case charging recent fabrication shown by bias will be discussed in terms

28. 4 WIGMORE, *op. cit. supra* note 21.
29. Annot., 140 A.L.R. 21, 93 (1942); 75 A.L.R.2d 909, 939 (1961); 58 AM. JUR. *Witnesses* § 828 (1948).
30. 349 Mo. 1103, 1110-11, 163 S.W.2d 956, 960 (1942).
31. *Ibid.*

of recent fabrication, while on another occasion the same court will discuss a similar factual situation under the bias rules.[32]

The only possible distinguishing feature between the regular bias cases and those considered under the concept of recent fabrication is the requirement that the fabrication be recent. This may or may not be present in the cases considered under the bias rules. At best, this only adds another argument for the relevancy of the consistent statement. This would be based on the contention that the prior statement consistent with the testimony shows that the content of the testimony is of long standing, and therefore its origin is not recent as charged. Since the portion of the impeaching charge relating to recent timing is thus shown to be untrue, the contention is that the whole impeaching charge is weakened. This argument is weak and is only supplemental. The bias rationale is primary in these cases and is sufficient in itself for admission. Although the results will generally be the same under either rule, the concepts become very confusing when a distinction of such little significance is so haphazardly applied.

Difficulty of a more serious nature is encountered if a court takes the label "recent fabrication" literally and applies the rule to admit consistent statements after all forms of impeachment where an inference of recent fabrication can be drawn. This is particularly true if they are careless in applying the requirement that the fabrication be recent. Any fabrication is recent in a sense when it is compared with a consistent statement which is prior. The concept was never intended to be applied so liberally, but should be limited to situations where, in substance, the impeachment charges the witness with altering or concocting his testimony solely for the purpose of this litigation.

Once the requirement of recent timing is relaxed and the recent fabrication rule is broadened to include any type of impeachment, the door is open for the admission of consistent statements for rehabilitation in almost any case. The misuse of the rule is particularly troublesome when the impeachment is by inconsistent statements.[33] In these situations it is easy to contend that an inconsistent statement infers fabrication which is more recent than a prior consistent statement; therefore, it is a recent fabrication; therefore, this consistent statement should be admitted. The difficulty is that,

32. *Compare* State v. Richardson, *supra* note 30 *with* Kelly v. American Centr. Ins. Co., *supra* note 15 and State v. Stogsdill, *supra* note 17.

33. State v. Higgs, 259 S.W. 454, 457 (Mo. 1924) inconsistent statement case discussed in terms of recent fabrication; *see* Jones v. St. Louis-S.F. Ry., 253 S.W. 737, 740-41 (Mo. 1923).

with this broad application, the original theory of relevancy is no longer applicable. This is one of the reasons for the large number of questionable decisions in the inconsistent statement cases.

Wigmore's position of treating the recent fabrication cases where motive is shown in the same category with the bias cases is probably the best solution.[34] At least it must be recognized that there is really no basis for distinction between these types of cases. The issue is relevancy, and both types of cases proceed on the same theory of relevancy: the consistent statement made prior to motive for fabrication, whether it be recent or otherwise, refutes the inference that the motive had any discrediting effect on the testimony. Any extension of the rule to situations where this reasoning is inapplicable only leads to confusion.

In *Nielsen v. Dierking*,[35] a 1967 decision, the Missouri Supreme Court correctly avoided extending the bias and recent fabrication rules beyond their proper scope. However, some language in the opinion, if not clarified, could lead to the unfortunate result of totally rejecting these rules in all cases. The primary issue in the case was the admission of a written consistent statement for rehabilitation under the Missouri rule admitting such statements following impeachment by inconsistent statement.[36] Because of the timing of the consistent statement, it was not admissible under our inconsistent statement rule.[37] As an alternative ground for admission, the defendant claimed that the over-all cross-examination of the witness tended to impute improper motives to her or to show influences on her to fabricate her testimony at the trial causing the consistent statement to be admissible under either the bias rule or the recent fabrication rule.

The exact nature of the cross-examination is not disclosed in the opinion, but it appears that the impeachment was not of the type necessary to bring either of these rules into operation, and the opinion ultimately reaches this conclusion.[38] However, in reaching what is clearly the correct decision, the following language could lead to difficulty in the future:

> More recent cases in Missouri have made no reference to the question of charges of recent fabrication or improper motives and have predicated admissibility of prior consistent statements following proof of impeachment on whether the statement was prior or subsequent to the impeaching statement. Some jurisdictions do

34. 4 WIGMORE, *op. cit. supra* note 21.
35. 418 S.W.2d 146 (Mo. 1967).
36. See text accompanying notes 43-73 *infra*.
37. See text accompanying note 114 *infra*.
38. 418 S.W.2d at 151.

> permit introduction of prior statements when fabrication or improper motives are imputed, *but we see no reason to change our rule.*[39]

No problem is created if by this language the court is saying that when the impeachment is by inconsistent statement rehabilitation must be within the limits of our inconsistent statement rule. The court is quite correct in refusing to extend either the bias or recent fabrication rule into this area. On the other hand, it would be unfortunate if this language is taken to mean that the Missouri rule admitting consistent statements following impeachment by inconsistent statements somehow pre-empts our use of the bias and recent fabrication rules in proper situations. The rules are distinct; they are applicable following different types of impeachment, and they are based on different rationale. They are not mutually exclusive. The bias and recent fabrication rules are applicable only when the impeachment is for bias or other showing of motive, and then only when the timing of the consistent statement was prior to the claimed bias or fabrication. The inconsistent statement rule applies after impeachment by inconsistent statements, and admission depends on a different requirement as to timing.[40] Only in those rare situations where both types of impeachment have been used on the same witness could both rules apply to admit the same consistent statement from the same witness. Usually the rules apply to different witnesses under different circumstances.

As the court pointed out, recent Missouri consistent statement cases have concerned rehabilitation after impeachment by inconsistent statements and have not involved the bias and recent fabrication rules. This is not surprising since some of the rules in the inconsistent statements area have been both unsettled and subject to criticism while the bias and recent fabrication rules have been generally accepted in most jurisdictions. It would seem a mistake to interpret this absence of dispute as a basis for rejecting consistent statements in situations where the bias and recent fabrication rules have always applied. As has been discussed, in these situations this rehabilitating evidence afforded by consistent statements is logically relevant and clearly useful.

4. Rehabilitation After Impeachment By Inconsistent Acts.

Impeachment by evidence of the witness' inconsistent or variant acts is often classified with the inconsistent statement cases. These situations

39. *Ibid.* (Emphasis added).
40. See text accompanying notes 108-116 *infra.*

are more correctly considered separately[41] since the reasoning supporting the rehabilitation here differs. In these cases the witness is impeached by showing his prior conduct which is claimed to be inconsistent with his testimony. The inconsistency is merely implied from the act. However, conduct alone is often ambiguous for this purpose. Therefore, as in the silence cases, the statements of the witness made at or near the time of the conduct are relevant to explain the acts and thus refute the inconsistency. Generally these statements will be consistent with the witness' testimony and are clearly admissible under this rationale.

The Missouri courts have never recognized the inherent distinction between rehabilitation after impeachment by inconsistent acts and rehabilitation after impeachment by inconsistent statements because they have never had a rehabilitation case clearly involving only acts. In addition, since Missouri admits consistent statements in either situation such a distinction has not been necessary. This position on variant acts has been expressed several times in the following language:

> Where a witness is impeached by proof of *variant acts* or statements, relevant evidence of the witness' prior statements correspondent with his testimony are admissible for the purpose of rehabilitation.[42]

Admission in the inconsistent act cases is based on sound and understandable reasoning. The inconsistent statement cases stand on different footing, and the validity of the rationale of these cases is not so clear. When the opportunity is presented, our court would be well-advised to recognize the distinction.

5. Rehabilitation After Impeachment By Inconsistent Statements

There is general agreement among the courts on the use of consistent statements following the various types of impeachment previously discussed; however, this agreement disappears when it comes to their use following impeachment by inconsistent statements.[43] A majority of the courts reject

41. 4 WIGMORE, EVIDENCE § 1126 at 201 (3rd ed. 1940).

42. State v. Crocker, 275 S.W.2d 293, 297 (Mo. 1955) (Emphasis added.); State *ex rel.* Berberich v. Haid, 333 Mo. 1224, 1228, 64 S.W.2d 667, 668-69 (1933); State v. Emma, 324 Mo. 1216, 1225, 26 S.W.2d 781, 784 (1930); State v. Higgs, *supra* note 33; Steele v. Kansas City So. Ry., 302 Mo. 207, 221, 257 S.W. 756, 760 (1924); State v. Maggard, 250 Mo. 335, 347, 157 S.W. 354, 359 (1913).

43. Annot., 140 A.L.R. 21, 49 (1942); 75 A.L.R.2d 909, 930 (1961); MCCORMICK, EVIDENCE § 49 at 108 (1954); 4 WIGMORE, *op. cit. supra* note 41, at § 1126; 58 AM.JUR. *Witnesses* § 825 (1948).

consistent statements where the impeachment is by inconsistent statements. Missouri and a few other jurisdictions admit them. Between these divergent views is the so-called Michigan rule under which consistent statements are sometimes admitted and sometimes excluded in the inconsistent statement cases.

The courts which reject this evidence reason that the different accounts by the witness are inconsistent no matter how many times he has repeated the story he tells from the witness stand. The courts which admit this evidence argue that if the inconsistent statement is to count against the witness then a consistent statement should count for him. This dispute is best answered by determining whether the rehabilitating evidence is relevant to refute the impeaching evidence. This inquiry requires a careful look at the theory of impeachment by inconsistent statements.

One unfamiliar with technical rules of evidence might assume that the inconsistent statement is received as proof of the facts stated, thus disproving the witness' contrary testimony. Many legal writers have argued in a convincing manner that inconsistent statements should be admitted for this purpose,[44] but no court now follows this position by judicial decision. The inconsistent statement is not admitted to prove the truth of the statement; to do so would violate the hearsay rule.

The theory of impeachment depends only on showing the act of making the inconsistent statement. The out-of-court statement is offered to show that this witness is capable of making errors in his story, and from this the jury is asked to infer that he is capable of making other errors; therefore, his testimony is unreliable. We place his contradictory statements side by side, and, as both cannot be correct, we know one of them is in error, but we do not try to determine which one. It is unnecessary to accept the prior statement as true and the in-court statement as false because the error is fully demonstrated by the fact of inconsistency.[45] McCormick[46] says the theory of attack is based upon the idea that by talking one way on the stand and another way on a previous occasion, the witness is blowing hot and cold. This raises a doubt as to the truthfulness of both statements. Missouri subscribes to this theory of impeachment by inconsistent statements.[47]

Viewed in this light, it should be apparent that a consistent statement

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44. McCORMICK, *op. cit. supra* note 43, § 39; 3 WIGMORE, *op. cit. supra* note 41, § 1018.
45. 3 WIGMORE, *op. cit. supra* note 41, § 1017.
46. McCORMICK, *op. cit. supra* note 43, § 34.
47. *E.g.*, State v. Kinne, 372 S.W.2d 62, 69 (Mo. 1963); Hammond v. Schuermann Bldg. & Realty Co., 352 Mo. 418, 177 S.W.2d 618 (1944).

fails to rehabilitate following this type of impeachment because it does not refute the discrediting fact that the witness has spoken inconsistently. The inconsistency remains; he continues to be in error on at least one occasion, and he still appears as one who blows both hot and cold. The fact that on a prior occasion, or even on a hundred prior occasions, he spoke consistently with his testimony in court does nothing to remove the impeaching fact that on at least one other occasion he spoke inconsistently.

In *Riney v. Vanlandingham*,[48] the first case in which the Missouri court considered consistent statements, they recognized the inadequacy of this evidence by quoting from one of the authorities of that day as follows:

> 'It may be observed on this kind of evidence in general (consistent statements), that a representation without oath, can scarcely be considered as any confirmation of a statement upon oath. . . . The probability is, that in almost every case the witness who swears to certain facts at the trial, has been heard to assert the same facts before the trial; and it is not so much in support of his character that he has given the same account, as it would be to his discredit that he should ever have made one different. If a witness has made a statement a hundred times in one way, and a hundred times another way, directly contrary, the only inference is that he is totally destitute of credit.' 1 Phil. Ev. 308.[49]

With this language in the first opinion on the subject, it comes as a surprise to some to find that Missouri has always followed the contrary rule. It is even more surprising to find that no Missouri opinion has ever discussed any supporting theory for this position. Prior case precedent has always been cited as the compelling reason for our rule. In view of this, it is appropriate to examine the early development of the cases.

In the *Riney*[50] case, quoted from above, the court properly held that consistent statements unrelated to rehabilitation were not admissible. The language of that opinion should have been sufficient to set the stage for adoption of the majority rule when a rehabilitation case was presented. Next, in *State v. Jones*,[51] the court again dealt with the admission of consistent statements apart from rehabilitation. In rejecting this evidence, the opinion contained dictum that the only circumstances in which the witness' out-of-court statements could be admitted were when brought out by the opposing party on cross-examination or to confirm the testimony of the

48. 9 Mo. 816 (1846).
49. *Id.* at 822.
50. Riney v. Vanlandingham, *supra* note 48.
51. 61 Mo. 232, 235 (1875).

witness after impeachment. This was obviously a general statement not intended to define accurately the limits of rehabilitation.

Nevertheless, five years later in *State v. Hatfield*,[52] when the court first faced the issue of the use of consistent statements for rehabilitation, they ignored the language in *Riney* and literally applied the dictum in *Jones*. In an opinion which contained no serious discussion of the problem, they approved the admission of consistent statements after impeachment by inconsistent statements. Three years later in *State v. Grant*[53] the court reached the same result using the sweeping language that consistent statements are admissible after *any* attack on the character of the witness.

This broad language was reaffirmed by dictum in a later case,[54] but in *State v. Taylor*,[55] the court re-examined its position. In this murder prosecution, the defendant's mother-in-law testified in his behalf and was impeached on cross-examination with her prior contradictory statements. In rejecting her consistent statements, which were part of her prior testimony before the coroner, the Missouri court adopted the majority position limiting rehabilitation by consistent statements to bias and recent fabrication situations. They quoted with approval several authorities supporting the reasoning of the majority rule.[56]

This decision could have firmly established the majority rule in Missouri if the holding had been correctly restated in *State v. Sharp*,[57] the next case on the subject. On this occasion the court agreed with the decision in *Taylor* to limit the prior rule which had admitted consistent statements after any attack on character. It failed to recognize, however, that in *Taylor* admission had been limited to the bias and recent fabrication cases. The court relied on *Taylor* as authority for the admission of consistent statements following impeachment by inconsistent statements, although it held exactly the contrary.[58] This misstatement is the source of the minority rule in

52. 72 Mo. 518, 521 (1880).
53. 79 Mo. 113, 133-34 (1883).
54. State v. Whelehon, 102 Mo. 17, 21, 14 S.W. 730, 731 (1890).
55. 134 Mo. 109, 154-56, 35 S.W. 92, 103 (1896).
56. *Id.* at 155-56, 35 S.W. at 103.
57. 183 Mo. 715, 733-37, 82 S.W. 134, 140-41 (1904).
58. In the *Sharp* opinion, *Id.* at 736, 82 S.W. at 141 the court stated as follows concerning the holding in *Taylor*:

> "In State v. Taylor, 134 Mo. 109, 35 S.W. 92, it is ruled that there is no doubt but that, when a witness is impeached by the medium of alleged contradictory statements, evidence may be introduced in rebuttal as to statements made by him of a similar character theretofore made, in corroboration of statements made by him on the trial."

The following quotation from the *Taylor* opinion, 134 Mo. at 155-56, 35 S.W. at 103 shows the actual holding of the court in that case:

Missouri. The *Sharp* case, for all practical purposes, settled the question. It was cited and followed without serious discussion in two criminal cases[59] and was then approved in two civil cases.[60] To date, Missouri has adhered to this position without significant deviation.[61] The issue has been presented to the court with surprising regularity, but this is probably more because of dissatisfaction with the rule than by reason of any uncertainty as to the court's position.

There is a third position, called the Michigan rule,[62] under which consistent statements after impeachment by inconsistent statements are excluded on some occasions and admitted on others. This rule, first adopted in the Michigan case of *Stewart v. People*,[63] follows the reasoning of the majority rule by recognizing that proof that the witness told the same story

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"Wharton says: When a witness is assailed on the ground that he narrated the facts differently on former occasions, while on re-examination it is competent for him to give the circumstances under which the narration was made, it is ordinarily incompetent to sustain him by proof that on other occasions his statements were in harmony with those made on the trial. On the other hand, where the opposing case is that the witness testified under corrupt motives, or where the impeaching evidence goes to charge the witness with a recent fabrication of his testimony, it is but proper that such evidence should be rebutted. . . . Inasmuch as the motives of Mrs. Gibson in testifying at the trial were not sought to be impugned, her testimony taken before the coroner was, under the authorities cited, inadmissible."

59. State v. Brown, 247 Mo. 715, 725-27, 153 S.W. 1027, 1030 (1913); State v. Maggard, 250 Mo. 335, 346-49, 157 S.W. 354, 358-59 (1913).

60. Kelly v. American Cent. Ins. Co., 192 Mo. App. 20, 23-25, 178 S.W. 282, 283 (St. L. Ct. App. 1915); Flach v. Ball, 209 Mo. App. 389, 400-02, 240 S.W. 465, 467-68 (St. L. Ct. App. 1922).

61. Nielsen v. Dierking, 418 S.W.2d 146, 149 (Mo. 1967); Stafford v. Lyon, 413 S.W.2d 495, 497-98 (Mo. 1967); Huston v. Hanson, 353 S.W.2d 577, 580-82 (Mo. 1962); Paige v. Missouri Pac. R.R., 323 S.W.2d 753, 757 (Mo. 1959); McElhattan v. St. Louis Pub. Serv. Co., 309 S.W.2d 591, 594-96 (Mo. 1958); State v. Crocker, 275 S.W.2d 293, 297 (Mo. 1955); State v. Emrich, 252 S.W.2d 310, 313-14 (Mo. 1952); State v. Emrich, 250 S.W.2d 718, 724 (Mo. 1952); Piehler v. Kansas City Pub. Serv. Co., 360 Mo. 12, 17-18, 226 S.W.2d 681, 683-84 (1950); State v. Fleming, 354 Mo. 31, 36, 188 S.W.2d 12, 16 (1945); Hammond v. Schuermann Bldg. & Realty Co., 352 Mo. 418, 423, 177 S.W.2d 618, 622 (1944); State v. Ransom, 340 Mo. 165, 173-74, 100 S.W.2d 294, 297 (1936); State *ex rel.* Berberich v. Haid, 333 Mo. 1224, 1226-29, 64 S.W.2d 667, 669 (1933) *reversing* Quinn v. Berberich, 51 S.W.2d 153, 156-57 (St. L. Mo. App. 1932); State v. Emma, 324 Mo. 1216, 1224, 26 S.W.2d 781, 784 (1930); Steele v. Kansas City So. Ry., 302 Mo. 207, 219-21, 257 S.W. 756, 759-60 (En Banc 1924); Jones v. St. Louis—S.F. Ry., 253 S.W. 737, 740-41 (Mo. 1923); Williams v. St. Louis Pub. Serv. Co., 245 S.W.2d 659, 663-66 (St. L. Mo. App. 1952) *rev'd on other grounds* 363 Mo. 625, 253 S.W.2d 97 (En Banc 1952); Lach v. Buckner, 229 Mo. App. 1066, 1075, 86 S.W.2d 954, 960 (K.C. Ct. App. 1935); Smiley v. Bergmore Realty Co., 229 Mo. App. 141, 148, 73 S.W.2d 836, 840 (K.C. Ct. App. 1934).

62. Annot., 140 A.L.R. 21, 65 (1942); 75 A.L.R.2d 909, 934 (1961); 4 WIGMORE, EVIDENCE § 1126 at 198 (3rd ed. 1940).

63. 23 Mich. 63, 73-74 (1871).

on a prior occasion does nothing to show the truthfulness of his testimony. Therefore, the consistent statements are not admitted for this purpose. They are, however, admitted for consideration in determining whether the witness made the alleged inconsistent statement. This is based on the reasoning that the making of consistent statements at or near the time of the alleged inconsistent statement casts doubt on the claim that the witness made the impeaching statement. Thus, if the witness denies or otherwise refuses to admit making the inconsistent statement, the consistent statement is admitted because under these circumstances there is dispute as to the making of the impeaching statement. On the other hand, if the witness admits making the inconsistent statement, the consistent statement is excluded because under these circumstances there is no dispute as to the making of the impeaching statement.

There is no difference in results between the Missouri rule and the Michigan rule when the witness refuses to admit making the impeaching statement since under both rules, the consistent statement is admitted. However, if he admits making the impeaching statement, then the consistent statement is excluded under the Michigan rule but is admitted under the Missouri rule.

The St. Louis Court of Appeals thoroughly examined the Michigan rule in *Williams v. St. Louis Pub. Serv. Co.*[64] where the plaintiff claimed injuries from a fall on a moving streetcar. The witness, another passenger, testified the fall was caused by a sudden jerk of the car. On cross-examination she was impeached with a written report that she had mailed to the company one week after the accident stating that there was no unusual motion. She admitted making the statement and that it was false, but explained she thought she could avoid being a witness by giving a negative report. To rehabilitate her, a police officer was then allowed to testify that shortly after the accident she told him the streetcar gave a sudden jerk. The court carefully reviewed the various rules on consistent statements. They emphasized the fallacy in the reasoning of the minority position, and they adopted the Michigan rule. Since this witness had admitted making the conflicting report to the streetcar company, the trial court was reversed for admitting the police officer's testimony.

Interestingly, although the opinion contains an extensive review of the Missouri cases on the use of consistent statements, the court failed to discuss or even cite the one prior Missouri case that supported the Michigan

64. 245 S.W.2d 659, 663-66 (St. L. Mo. App. 1952).

rule.[65] In *State v. Creed*[66] the witness, on cross-examination, admitted she gave contrary perjured testimony before the coroner and grand jury. In rejecting a consistent written statement offered to rehabilitate, the court stated:

> The defendant had discredited the witness by cross-examination and by her admission of perjury. The purpose of the state was to rehabilitate it. There were two inconsistent statements, one of which was necessarily false. Defendant did not offer the cross-examination to prove the verity of her testimony, but to show that it was unworthy of belief and could not be relied upon. Her testimony was discredited, and she was a perjurer by her own admission. Her impeachment was not disproved by the use of the supplementary statement, and that was all it offered to establish . . . . The only way to meet evidence of a contradictory statement is to prove the witness did not make it. In the present case she admitted making it.[67]

On appeal, *Williams* was reversed on a procedural point.[68] The supreme court recognized and delineated the issue presented, but they refused to either approve or reject the Michigan rule. This left the Missouri position unsettled.

The court continued to follow the minority position without reference to *Williams* until *McElhattan v. St. Louis Pub. Serv. Co.*[69] when they again refused to either approve or reject the *Williams* position since that rule would not exclude consistent statementes in this situation because the witness testified he did not remember making the inconsistent statement.

A clear decision on the Michigan rule required facts where the witness clearly admitted making the inconsistent statement. In *Huston v. Hanson*[70] the defendant appealed relying on the *Williams* rule for reversal, but the court found that the essence of the witness' testimony was that he did not remember making the inconsistent statement so the requisite facts for a decision settling the issue were again missing. In approving the admission of the consistent statement the court distinguished *Williams* because there "the witness had impeached herself by her own admission of intentionally

65. It was cited in appellant's brief on appeal to the Supreme Court. 363 Mo. 625, 627 (En Banc 1952).
66. 299 Mo. 307, 252 S.W. 678 (1923).
67. *Id.* at 316, 252 S.W. at 680.
68. 363 Mo. 625, 634-36, 253 S.W.2d 97, 103-04 (En Banc 1952).
69. 309 S.W.2d 591, 594-96 (Mo. 1958).
70. 353 S.W.2d 577, 580-82 (Mo. 1962).

making a false statement. . . ."[71] By this decision the rule in *Williams* remained neither approved nor rejected, but this language afforded an opening for severely limiting its application.

The court took advantage of that opening in *Stafford v. Lyon*,[72] the recent case discussed at the beginning of this article. The Michigan rule was squarely in issue since the witness clearly admitted making the written statement used for impeachment. The court concluded that by this statement in *Huston*, the *Williams* rule, under which consistent statements are excluded, was narrowly restricted to those situations in which the witness admits making the inconsistent statement deliberately and falsely for his own purposes. The exact limits of this distinction are not altogether clear. The *Stafford* opinion does not disclose the circumstances of the impeaching statement except to say the witness admitted making it. On this basis the case was distinguished from *Williams*. Apparently an inconsistent statement admittedly made in error would not be deliberate and false so would be treated the same way. Beyond this, it remains to be seen what situations, if any, will be brought within the *Williams* rule. Although the court has indicated approval of *Williams*,[73] no case has actually rejected consistent statements on that principle since it has always been distinguished. In the form to which *Williams* is now limited, any rationale for treating that situation one way and all other inconsistent statement cases another is most obscure.

In summary, Missouri continues to follow the minority position admitting consistent statements following impeachment by inconsistent statements. Although we have not expressly rejected the Michigan rule, we have so limited it as to destroy any improved reasoning it might bring to our decisions. At the same time, the failure to overrule *Williams* leaves a small undefined area in which consistent statements may be rejected; in this respect our position is a hybred unknown to any other jurisdiction.

### C. *Other Rules Admitting Consistent Statements*

Two other rules, unrelated to those already discussed, are sometimes confused with the rehabilitation cases because they apply in impeachment situations and often operate to admit consistent statements. First, where impeachment is based on an alleged inconsistent statement, evidence will always be admitted to dispute the impeaching evidence as to what the state-

71. *Id.* at 582.
72. 413 S.W.2d 495, 498 (Mo. 1967).
73. *Id.* at 498.

ment actually was. Thus in *State v. Simmons*[74] where the witness had identified the defendant as the man who robbed him, he was impeached by other witnesses who testified that at the police station he stated that the man who robbed him was bigger than the defendant. The state was then allowed to call police officers present at the time who testified that the witness did not make that statement, but in fact said that the defendant was the person who robbed him. This was consistent with his testimony, but it was admitted to directly refute the defendant's evidence that a contradictory statement was uttered.

The other such rule also applies where the impeachment is by inconsistent statement. It allows the impeached party to put other portions of the same statement in evidence to show the context and circumstances of the entire statement. Thus, where the opposing party proves an inconsistent statement that is part of a written statement,[75] a deposition,[76] or testimony at a former trial,[77] the other party may read from the same statement, deposition, or testimony other portions which are relevant to show the context or circumstances of the inconsistent portion. To the extent that these parts confirm direct testimony of the witness, consistent statements are admitted.

There are also some particular types of cases in which special rules operate to admit consistent statements for reasons quite unlike those in the rehabilitation cases. The discussion of these rules is beyond the scope of this article, but they are mentioned to avoid confusion with the rehabilitation theories. One of these is the rule that admits evidence of the prior identification of the defendant in criminal cases.[78] Another is that which admits evidence in a rape case of the complaint of the prosecutrix usually made at or near the time of the violation.[79] On similar theories a few courts admit evidence of complaint by the victim of certain other crimes.[80] Although the effect of these rules is to admit certain consistent statements of the witness, it is important to recognize that the rationale for admission is entirely different from the rehabilitation cases.

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74. State v. Simmons, 39 S.W.2d 774, 775-80 (Mo. 1931); *accord.*, State v. Powell, 55 S.W.2d 334, 335 (Spr. Mo. App. 1932).
75. State v. Beishir, 332 S.W.2d 898, 903 (Mo. 1960).
76. State v. Robertson, 328 S.W.2d 576, 582 (Mo. 1959).
77. State v. Gerberding, 272 S.W.2d 230, 234 (Mo. 1954).
78. Hardy, *Admissibility of Prior Identification Testimony*, 31 Mo. L. REV. 558 (1966).
79. State v. Richardson, 349 Mo. 1103, 1111, 163 S.W.2d 956, 960 (1942); WIGMORE, *op. cit. supra* note 62, §§ 1134-40.
80. WIGMORE, *op. cit. supra* note 62, §§ 1142-43.

## II. Further Aspects of the Missouri Rule

### A. *The Requirement of Impeachment*

In Missouri the only types of impeachment which will permit the use of consistent statements for rehabilitation are bias, recent fabrication, and inconsistent statements.[81] Direct contradiction of the witness by another witness will not permit the use of consistent statements[82] nor will mere cross-examination, no matter how vigorous.[83] The court has rejected consistent statements after the witness was asked on cross-examination if he had discussed his testimony with his attorneys.[84] They were also rejected where the impeaching evidence revealed that the plaintiff had failed to disclose prior injuries in an earlier personal injury action against another defendant.[85]

In the inconsistent statement cases, the court has been strict in requiring actual proof of the impeaching statement before the consistent statement will be admitted. Before using an inconsistent statement for impeachment, a foundation must be laid.[86] This is done by asking the witness on cross-examination if he made the inconsistent statement. The question must be sufficiently specific as to time, place, and person to whom made so as to identify the statement for the witness.[87] If the witness admits he made it, this proves the statement, and extrinsic evidence is not necessary. Only if the witness does not admit making the statement is extrinsic evidence admissible to prove it.[88] One reason for requiring the foundation question is to avoid surprising the witness by giving him an opportunity to disprove or explain the statement. Also it avoids the time consuming process of prov-

81. The early case of State v. Grant, 79 Mo. 113, 133-34 (1883), which stated consistent statements were admissible after any attack on character was limited to impeachment by consistent statements in State v. Sharp, 183 Mo. 715, 736, 82 S.W. 134, 141 (1904). See text accompanying notes 45-48 *supra.*

82. Aly v. Terminal R.R. Ass'n of St. L., 336 Mo. 340, 351, 78 S.W.2d 851, 856 (1934).

83. State v. Fleming, 354 Mo. 31, 36-38, 188 S.W.2d 12, 16 (1945); *accord,* McElhattan v. St. Louis Pub. Serv. Co., 309 S.W.2d 591, 594 (Mo. 1958).

84. State v. Brown, 247 Mo. 715, 725-27, 153 S.W. 1027, 1030 (1913).

85. Ayres v. Keith, 355 S.W.2d 914, 921-22 (Mo. 1962).

86. State v. Stallings, 326 Mo. 1037, 1046-47, 33 S.W.2d 914, 917 (1930); Peppers v. St. Louis-S.F. Ry. Co., 316 Mo. 1104, 1117-18, 295 S.W. 757, 762 (1927); Kersten v. Hines, 283 Mo. 623, 632-33, 223 S.W. 586, 589 (En Banc 1920).

87. State v. Stallings, *supra* note 86; Peppers v. St. Louis-S.F. Ry. Co., *supra* note 86; State v. Parker, 96 Mo. 382, 393, 9 S.W. 728, 733 (1888).

88. State v. Wallach, 389 S.W.2d 7, 12-13 (Mo. 1965); Andrews v. Parker, 259 S.W. 807, 810-11 (St. L. Mo. App. 1924); State v. Cooper, 83 Mo. 698 (1884). *But see* Wigmore, *op. cit. supra* note 62, § 1037 stating that the better and more widely accepted rule is that extrinsic evidence should be admitted no matter what the answer to the foundation question.

ing it by extrinsic evidence if the witness is willing to admit he made it.[89]

Several Missouri cases have considered the admissibility of rehabilitating evidence where the witness did not admit making the statement when the foundation question was asked and no extrinsic evidence was ever offered to prove it. In *McElhattan v. St. Louis Pub. Serv. Co.*[90] the witness testified concerning stop and go lights in an intersection case. He was asked on cross-examination if he remembered giving an investigating attorney a written statement that said there were no electric signals at the intersection. He answered that he did not remember that statement. In *Paige v. Missouri Pac. R.R.*[91] a certain question and answer from the witness' deposition was read to him, and he was asked if he gave that answer to that question. He replied that he did not recall that answer. In each case the impeachment process stopped with the foundation question because neither the written statement nor the deposition was offered in evidence by the cross-examining party. In each case, the other party then offered the consistent statement of the witness for rehabilitation.

In accord with its prior decisions on this question,[92] the court held in both cases that the subsequent offer of consistent statements was premature and should not be admitted in evidence because the witness had not actually been impeached by inconsistent statements. Only the foundation question had been asked so there was no actual proof of the inconsistent statement.

These decisions are sound in refusing rehabilitation since the court should not spend time rehabilitating a witness where impeachment is not actually proved. On the other hand, although rehabilitation is denied since there is no actual impeachment, the party calling the witness may feel that doubt has been cast upon the testimony by the suggestive nature of the foundation question, which the jury may fail to distinguish from the actual proof of the inconsistent statement. The party calling the witness should move to strike the foundation questions and answers from the consideration of the jury when it becomes apparent the inconsistent statement will not be offered. The foundation has no place in the record when proof of the statement is withheld. With appropriate instruction to the jury, this should

89. WIGMORE, *op. cit. supra* note 62, § 1125.
90. 309 S.W.2d 591, 594-96 (Mo. 1958).
91. 323 S.W.2d 753, 757 (Mo. 1959).
92. Long v. F. W. Woolworth Co., 232 Mo. App. 417, 427-28, 109 S.W.2d 85, 91-92 (K.C. Ct. App. 1937); Flach v. Ball, 209 Mo. App. 389, 400, 240 S.W. 465, 467 (St. L. Ct. App. 1922) (alternative holding); See State v. Grant, 79 Mo. 113, 133-34 (1883). *But see* Smiley v. Bergmore Realty Co., 229 Mo. App. 141, 148-49, 73 S.W.2d 836, 840-41 (K.C. Ct. App. 1934).

minimize any benefit to be gained from the implied but unproved inconsistency. Where possible, the trial judge might refuse to allow the foundation questions to be asked unless the cross-examining party is pursuing good faith cross-examination, which should require an intention to prove the statement where proof is reasonably available.

### B. *Proving the Consistent Statement*

Like inconsistent statements, consistent statements take many forms. They may be testimonial in nature such as testimony in former trials[93] or in other hearings such as before a grand jury,[94] a coroner,[95] or in preliminary criminal hearings;[96] or they may be found in depositions in either the present[97] or other cases.[98] They may be in writings such as a written statement taken by an investigator[99] or a questionnaire returned by mail to one of the parties[100] or parts of a letter or other document written by the witness.[101] Most commonly they are merely oral statements made by the witness in the presence of some other person.[102]

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93. State v. Crocker, 275 S.W.2d 293, 297 (Mo. 1955) (attorney for accomplice tried separately testified to the testimony of the witness in the other trial); State v. Gerberding, 272 S.W.2d 230, 334 (Mo. 1954) (court reporter testified to witness' prior testimony).

94. See State v. Whelehon, 102 Mo. 17, 21, 14 S.W. 730, 731 (1890) (dictum); *cf.* State v. Creed, 299 Mo. 307, 314-17, 252 S.W. 678, 680 (1923).

95. State v. Taylor, 134 Mo. 109, 35 S.W. 92, 103 (1896); State v. Creed, *supra* note 94.

96. See Flach v. Ball, *supra* note 92.

97. State *ex rel.* Berberich v. Haid, 333 Mo. 1224, 1226-29, 64 S.W.2d 667-69 (1933) *reversing* 51 S.W.2d 153, 156-57 (St. L. Mo. App. 1932); Quinn v. Berberich, 68 S.W.2d 925, 926-27 (St. L. Mo. App. 1934) (retrial of previously cited case); see Ayres v. Keith, 355 S.W.2d 914, 921-22 (Mo. 1962); State v. Robertson, 328 S.W.2d 576, 582 (Mo. 1959); Paige v. Missouri Pac. R.R., 323 S.W.2d 753, 757 (Mo. 1959).

98. Steele v. Kansas City So. Ry., 302 Mo. 207, 219-22, 257 S.W. 756, 759-60 (1924).

99. Stafford v. Lyon, 413 S.W.2d 495, 497-98 (Mo. 1965); Huston v. Hanson, 353 S.W.2d 577, 580-82 (Mo. 1962); McElhattan v. St. Louis Pub. Serv. Co., 309 S.W.2d 591, 594-96 (Mo. 1958).

100. Piehler v. Kansas City Pub. Serv. Co., 360 Mo. 12, 17-18, 226 S.W.2d 681, 683-84 (1950).

101. *Cf.*, State v. Johnson, 334 Mo. 10, 19-20, 64 S.W.2d 655, 659 (1933).

102. *E.g.*, State v. Emrich, 252 S.W.2d 310, 313-14 (Mo. 1952) (highway patrolman, sheriff and newspaperman testified to statements the witness made after being arrested with the defendant); State v. Emrich, 250 S.W.2d 718, 724 (Mo. 1952) (law officers testified to statements the witness made about the crime); State v. Richardson, 349 Mo. 1103, 1110-11, 163 S.W.2d 956, 960 (1942) (mother testified to complaints daughter made of being raped by her father, the defendant); State v. Ransom, 340 Mo. 165, 173-74, 100 S.W.2d 294, 297 (1936) (owner of service station testified to conversation with his employee after robbery); State v. Higgs, 259 S.W. 454, 457 (Mo. 1924) (treating doctor testified to robbery victim's statements).

Unlike inconsistent statements, the courts do not require foundation questions in showing consistent statements. The reasons for requiring a foundation for inconsistent statements are not applicable in the case of consistent statements.[103] When admissible, they may be proved by the impeached witness himself[104] or by extrinsic evidence[105] or by both.[106]

### C. *Restrictions on the Missouri Rule*

The Missouri courts apply two important restrictions on the use of consistent statements after impeachment by inconsistent statements. The first is that only those consistent statements that are related to the subject matter of the impeaching statement are admissible.[107] No matter what reasoning is relied upon to support the minority rule of admission in the inconsistent statement cases, it is clear that consistent statements on subject matter foreign to that of the inconsistent statement could never be relevant to rehabilitate.

The second restriction in the inconsistent statement cases is the requirement that the consistent statement must have been made prior to the time of the inconsistent statement. The supreme court first adopted this rule in *State v. Creed*[108] where the defendants were charged with killing a police officer in a saloon. The witness, described in the opinion as a lewd woman, gave police a written statement incriminating the defendants. The next day in testimony before the grand jury and the coroner she changed her story to absolve them. A few hours later she gave the police a supplemental written statement retracting her testimony and again implicating the defendants. At trial she testified against the defendants, and on cross-examination she was impeached with her inconsistent testimony before the grand jury and coroner. The trial court was reversed for allowing the use of the supplemental statement for rehabilitation because it was made subsequent to the impeaching statements. The court reasoned that this limitation is necessary because:

> Admitting such testimony would resolve itself in a race resulting in rebuttal and surrebuttal, to determine which party could pro-

103. See text accompanying note 89 *supra.*
104. State v. Sharp, 183 Mo. 715, 733-37, 82 S.W. 134, 141 (1904).
105. *E.g.*, cases cited note 102 *supra;* State v. Crocker, *supra* note 93 (consistent statement shown on cross-examination of the impeaching witness).
106. State v. Emma, 324 Mo. 1216, 1224-25, 26 S.W.2d 781, 784 (1930).
107. State v. Fleming, 354 Mo. 31, 37-38, 188 S.W.2d 12, 16 (1945).
108. 299 Mo. 307, 317, 252 S.W. 678, 681 (1923) (alternative holding).

duce the greater number of witnesses in contradiction. This would not determine their credibility and would lead to injustice.[109]

The St. Louis Court of Appeals had reached the same conclusion on the same question a year earlier.[110] On every occasion since when this issue has been discussed, the court has required that the consistent statement be prior in time to the impeaching statement[111] although in two cases where the issue was not discussed and apparently was not raised by counsel, the court approved the admission of consistent statements made after the inconsistent statement.[112]

The burden of proving the sequence of time between the two statements is on the offering party. Thus, a trial court was affirmed in rejecting an offer of proof which contained all the requisites for admitting a consistent statement except a specific reference to the sequence of time between the two statements.[113]

Finally, the very recent case of *Nielsen v. Dierking*[114] is particularly helpful because it spells out in some detail the mechanics for determining which statement was prior. In this case there was conflicting evidence as to which statement was prior. The impeaching statement, taken by an attorney and a reporter on a stenotype machine, was dated January 7, 1963. The rehabilitating statement, taken in longhand by an attorney, was dated July 2, 1963, almost six months later. The witness, called by the defendant, testified the statements were given on the respective dates shown therein. Later, on the second round of redirect and recross-examination, she vacillated and

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109. *Ibid.*

110. Flach v. Ball, 209 Mo. App. 389, 400-02, 240 S.W. 465, 467-68 (St. L. Ct. App. 1922) (alternative holding).

111. State *ex rel.* Berberich v. Haid, 333 Mo. 1224, 1226-29, 64 S.W.2d 667-69 (1933) (inconsistent statement was part of written statement given shortly after the accident and consistent statement was part of deposition taken on Saturday before trial started) *reversing* Quinn v. Berberich, 51 S.W.2d 153, 156-57 (St. L. Mo. App. 1932) (recognizing the rule requiring the consistent statement to be prior in time but which held the admission of a later statement was not prejudicial); Jones v. St. Louis-S.F. Ry., 253 S.W. 737, 740-41 (Mo. 1923) (inconsistent statement made to persons at the accident and consistent statement made to a doctor at the hospital); Ayres v. Keith, 355 S.W.2d 914, 921-22 (Mo. 1962) (alternative holding) (inconsistent statement in prior litigation and consistent statement in deposition in present case). *But see* Smiley v. Bergmore Realty Co., 229 Mo. App. 141, 147-48, 73 S.W.2d 836, 840 (K.C. Ct. App. 1934).

112. State v. Crocker, 275 S.W.2d 293, 297 (Mo. 1955) (inconsistent statement at preliminary hearing of an accomplice and consistent statement at the trial of the accomplice); State v. Higgs, 259 S.W. 454, 457 (Mo. 1924) (consistent statement to driver who took injured witness to the hospital and consistent statement to doctor at the hospital).

113. State v. Ashbrook, 11 S.W.2d 1037, 1039 (Mo. 1928).

114. 418 S.W.2d 146 (Mo. 1967).

stated that the longhand statement used to rehabilitate was given two or three days or perhaps a week prior to the impeaching statement. The trial court allowed the defendant to rehabilitate the witness with the consistent statement. In so ruling, it is possible that the court decided the consistent statement was prior to the inconsistent statement, but it appears more likely that the prior in time requirement was simply misapplied.[115]

After the jury returned a verdict for the defendant, the trial court granted the plaintiff a new trial for error in admitting the consistent statement. In affirming the granting of the new trial, the supreme court first reaffirmed the requirement that the consistent statement must be prior to the inconsistent statement. They pointed out that determination of the factual question of which statement was executed first is a question of law to be determined by the trial judge. The defendant contended that, since there was some evidence that the consistent statement was prior, it was admissible as a matter of law. In rejecting this the court stated:

> It [the consistent statement] is admissible if, and only if, the court finds as a fact that it was made prior to the impeaching statement.[116]

They further stated that even though the court determines at trial that the statement is admissible, it can later conclude on a motion for new trial that the facts justify and compel a different conclusion. However, the trial court's determination of which statement is prior will not be disturbed on appeal unless there has been an abuse of judgment or discretion amounting to error of law.

### D. *Not Substantive Proof*

The principle that consistent statements are not admitted as substantive proof of the facts stated was discussed when first considering the basis for their relevancy as rehabilitating evidence.[117] They are admitted only as proof of the fact that a statement was made. The opposing party is entitled to an instruction to the jury to this effect.[118]

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115. *Id.* at 150.
116. *Id.* at 150-51.
117. Cases cited note 12, *supra.*
118. State v. Emma, 324 Mo. 1216, 1225, 26 S.W.2d 781, 785 (1930) approved a written instruction which advised the jury that the consistent statements were not admitted "as proof of the facts contained in the statement, but solely for the purpose of corroborating the testimony of the witness . . . ." Under MISSOURI APPROVED JURY INSTRUCTIONS, effective January 1, 1965, no formal instruction would be given to the jury but the trial judge at the time the evidence is received would inform the jury of the limited purpose of the evidence as stated above.

This is the same rule as is applied to the admission of inconsistent statements for impeachment. They are admitted to prove the act of inconsistency, but not to prove the truth of the statement.[119] Although the theory of the rule is the same for both kinds of statements, the effect in application is different.

In the case of inconsistent statements, the operation of the rule is best observed in a situation where the inconsistent statement is the only evidence of a necessary element of the plaintiff's case. For example, in *State v. Fitch*[120] the prosecution's key witness failed to identify the defendant at trial. The witness was impeached by showing that at the police station he identified the defendant as the person in question. Since this inconsistent statement at the police station was the only testimony identifying the defendant, the court held that the state had failed to prove this element of its case. The court stated, ". . . the impeachment. . . left the case just where it was before the impeachment—without any evidence to show that defendant was the [person in question]."[121] In these cases, since the testimony of the witness differs from the inconsistent statement, it is plausible to instruct the jury to disregard the out-of-court statement as proof of the facts stated, but to consider the act of making it as bearing on the truth of the contrary testimony in court. Although this requires some fancy mental gymnastics, the idea can at least be broadly conveyed to the jury.

The application of this rule to the consistent statement is quite different because the in-court testimony is the same in substance as the out-of-court statement. Here we are telling the jury that they cannot consider the consistent statement as proof of the facts stated, but they should consider it as corroborative of another statement containing the same facts. In dealing with a similar problem, Justice Cardozo once observed: "Discrimination so subtle is a feat beyond the compass of ordinary minds."[122] The practical result is that in response to the instruction the jury may sometimes reduce the weight given to the consistent statement, but it is unlikely that they really understand, much less apply, the rule limiting the statement to non-substantive purposes.

### E. *Consistent Statement by a Party*

So far the discussion has concerned only the consistent statements of

119. Text accompanying notes 44-47 *supra.*
120. 162 S.W.2d 327 (St. L. Mo. App. 1942).
121. *Id.* at 330.
122. Shepard v. United States, 290 U.S. 96, 104 (1933).

the impeached witness. What if the witness is also a party? There is a major difference between the use of the out-of-court inconsistent statement of the witness for impeachment and the use of the out-of-court statement of the opposing party. While the hearsay rule bars the use of the witness' inconsistent statement to prove the facts stated, a like statement of an opposing party is admissible as proof of the facts stated because it is an admission under the hearsay rule.[123] Where the party has testified and his contradictory out-of-court statement is shown on cross-examination or by another witness, this statement serves two purposes: first, it is proof of the facts stated; second, it impeaches the party in his role as a witness.[124] Therefore, the party, as an impeached witness, should be able to use his prior consistent statements for purposes of rehabilitation just as any other witness.

It is clear from the Missouri cases that if the consistent statement of the party is offered to prove the facts stated, it will not be admitted.[125] Two recent Missouri cases leave the question of admissibility uncertain when the party's statement is offered for non-substantive purposes. In *Stratton v. City of Kansas City, Mo.*,[126] the plaintiff offered her prior written statement that she fell on broken sidewalk and not on ice as contended by the defendant. The opinion says that the statement must be excluded because it was offered to prove the facts stated.[127] There is language in the opinion, however, which suggests that the consistent statement of a party is not admissible even when offered for the limited purpose of rehabilitating the party as a witness.[128] In *Kratzer v. King*[129] the court rejected consistent portions of the impeached plaintiff's deposition stating simply that it was "clearly self-serving, hearsay and inadmissible," but without citation of authorities or discussion of the rehabilitation concept.

On the other hand, in a much earlier case[130] a majority of the court approved the admission of the prior consistent statement of a party-witness

123. WIGMORE, EVIDENCE § 1048 (3rd ed. 1940).
124. *Ibid.*
125. Stratton v. City of Kansas City, Mo., 337 S.W.2d 927, 930-32 (Mo. 1960); Gough v. General Box Co., 302 S.W.2d 884, 887-88 (Mo. 1957).
126. *Supra* note 125.
127. *Id.* at 932.
128. *Id.* at 931 where the court stated ". . . it certainly was error to admit this self-serving statement of plaintiff for any purpose . . . ." Also see the general discussion in the opinion of the various differences between out-of-court statements of parties and witnesses.
129. 401 S.W.2d 405, 409 (Mo. 1966).
130. Steele v. Kansas City So. Ry., 302 Mo. 207, 219-22, 257 S.W. 756, 759-60 (1924).

where it was offered for rehabilitation. The trial court was reversed on two grounds: this evidentiary matter and an unrelated instruction issue. Four judges who concurred in the result on the instruction issue, however, refused to rule on the applicability of the consistent statement theory of rehabilitation to a party.[131] On several other occasions the court has dealt with consistent statement cases involving parties; sometimes admitting them,[132] and sometimes rejecting them,[133] but always on other grounds and without indication that the rehabilitation theory is inapplicable where the witness is a party.

Wigmore[134] says that the same rule should be applied to parties as is applied to witnesses so that in a jurisdiction like Missouri, where the consistent statements of a witness are admitted after impeachment by inconsistent statements, the court should also admit the consistent statements of a party if he has testified and his inconsistent admissions have been shown. Such a rule merely recognizes the dual purpose of the out-of-court statement of a party by allowing the impeaching function to be met with the same type of rehabilitating evidence as is available to any other witness. Since our courts have been willing for the witness to be supported by his out-of-court consistent statements, it is only reasonable that they should be willing to afford the same opportunity to the party, who is often the most important witness in the litigation.

### F. *An Evaluation of the Missouri Rule*

It should be clear from previous discussions that the minority rule followed in Missouri is subject to substantial criticism because of the absence of any sound theory to support it. Notwithstanding this fact, a fair appraisal of our rule suggests that the results which obtain from it are not as objectionable as might seem, and in some ways may be preferable to that followed in some other jurisdictions.

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131. *Id.* at 222, 257 S.W. at 760.

132. Wills v. Sullivan, 211 Mo. App. 318, 329-31, 242 S.W. 180, 183-84 (K.C. Ct. App. 1922). This case, discussed in text accompanying note 27 *supra,* applies both the bias rule and the recent fabrication rule.

133. Ayres v. Keith, 355 S.W.2d 914, 921-22 (Mo. 1962) (plaintiff's consistent statements in deposition rejected because impeachment was not by inconsistent statements and the deposition was not prior in time to the impeaching event); Paige v. Missouri Pac. R.R., 323 S.W.2d 753, 757 (Mo. 1959) (plaintiff's consistent statements in deposition rejected because although foundation had been laid for inconsistent statements, they had not been proved); Gough v. General Box Co., *supra* note 125 (plaintiff's consistent statement offered as substantive proof of the facts stated); Jones v. St. Louis-S.F. Ry., 253 S.W. 737, 740-41 (Mo. 1923) (plaintiff's consistent statement rejected because it was not prior in time to the impeaching statement).

134. 4 WIGMORE, EVIDENCE § 1133 (3rd ed. 1940).

First, consider our rule in comparison with the Michigan rule[135] under which the consistent statement is admitted to help the jury determine whether the witness actually uttered the impeaching statement. Under this rule, the consistent statement is admitted in all those cases where, in response to the foundation question, the witness refuses to admit he made the inconsistent statement. Since the Missouri rule is one of admission in any situation where the impeachment is by inconsistent statement, the two rules give the same results except in those few instances where the witness clearly admits he made the impeaching statement. Even if a preference for the reasoning of the Michigan rule is conceded, the result differs in such a small percentage of the cases that the practical difference between following one rule or the other is minor.

There are some considerations which suggest that the Missouri result is preferable. For one thing, it seems questionable whether the relatively unimportant fact of admitting or denying the inconsistent statement should govern the entire course of rehabilitation In this same respect, if the use of consistent statements is to depend solely on the witness' refusal to admit making the impeaching statement, this fact will encourage the witness to avoid such an admission by responding to the foundation question with assertions of faulty memory, if not outright false denials. In these respects the Missouri rule may be better even though the logic of the Michigan rule is superior.

In addition, the results under the Missouri rule probably comes closer to the more progressive thinking on the admission in general of out-of-court statements than any of the other rules. For several years, leading writers in the field of evidence have urged that where the witness is present in court, his prior out-of-court statements should be admitted as substantive evidence of the facts stated.[136] More recently, the *Uniform Rules of Evidence*,[137] now adopted or under consideration in various states,[138] provide for the admission of all previous statements of any person present at the hearing and available for cross-examination[139] subject only to the discretion of the judge to exclude when probative value is outweighed by considera-

135. Text accompanying notes 62-73.

136. McCORMICK, EVIDENCE, § 39 (1954); 3 WIGMORE, EVIDENCE § 1018 (3rd ed. 1940).

137. Drafted by the National Conference of Commissioners on Uniform State Laws and by it approved at its Annual Conference, 1953. Approved by the American Bar Association, 1953.

138. *E.g.* Adopted in Kansas, 1963, also in Panama Canal Zone and the Virgin Islands; inconsistent statements admitted for substantive purposes under CAL. EVIDENCE CODE 1235, effective January 1, 1967.

139. UNIFORM RULE OF EVIDENCE 63(1).

tions of time, prejudice, confusion, or surprise.[140] The trend seems to be toward the admission of all out-of-court statements to prove the facts stated if the witness is present in court. An extensive discussion of all the arguments and reasons for this position is beyond the scope of this article. Among the more important is that the witness is present for cross-examination, which eliminates the principal dangers of hearsay evidence. Also, since the prior statements are nearer in time sequence to the event related, they may often be more accurate than the testimony.[141]

Since the Missouri rule admits both consistent and inconsistent statements while the majority rule would admit only the latter, the result in the Missouri cases more nearly approaches that of the *Uniform Rules*. Under our rule the jury is instructed not to consider the statement as substantive proof while the *Uniform Rules* would not apply this limitation, but the distinction is less significant in practice than in theory when the effect which the average juror gives to such an instruction is honestly appraised.

## III. Conclusion

While it is possible to point to favorable aspects in the Missouri position, the strongest indication that our rule is inferior is that it must be defended on case precedent without consideration for supporting theory or on the assumption that the jury uses the evidence for a different purpose than that for which it is admitted. Admission of consistent statements in the bias and recent fabrication cases is based on sound rationale, and the function of the evidence can be properly understood by the jury. This cannot be said for admission where the impeachment is by inconsistent statements. If our rule is to be justified because it is desirable for the jury to have the use of the out-of-court statement for substantive purposes, then this should be accomplished either by legislation or by judicial decision embodying that principle and not upon the fiction of misused rehabilitation.

On the other hand, if the substantive use of consistent statements is unwise, then we should be prepared to re-examine our position on rehabilitation in the inconsistent statement cases. The act of making a consistent statement fails to refute the fact that the witness spoke inconsistently, and, failing to meet this issue, it is useless for rehabilitation purposes. Respect for case precedent is an important characteristic of our system of law, but it was never intended to prevent the courts from the needed re-exami-

140. Uniform Rule of Evidence 45.
141. McCormick, *op. cit. supra* note 136, § 39; 3 Wigmore, *op. cit. supra* note 136, § 1018.

nation of any principle, no matter how long standing it may be. When the opportunity is afforded, our court should look beyond the holdings of prior decisions and carefully consider whether consistent statements can properly be said to rehabilitate the inconsistent witness.